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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARIA MIRANDA, Defendant and Appellant.	F044775 (Super. Ct. No. BF103630A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Michael P. Farrell and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Maria Miranda stands convicted, following a jury trial, of possession of methamphetamine for sale (Health & Saf. Code, § 11378).[1] Sentenced to 16 months in

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[1] Further statutory references are to the Health and Safety Code unless otherwise stated. [Fn. contd.]

state prison and ordered to pay various fines and register as a narcotics offender, she now appeals, raising claims of instructional error. For the reasons which follow, we will affirm.

FACTS

I

PROSECUTION EVIDENCE

At approximately 10:00 a.m. on August 23, 2003, members of the Kern Narcotics Enforcement Team and California Methamphetamine Multijurisdictional Enforcement Team went to a residence on Myrtle Street in Lamont to serve a search warrant. Only the officers were in the vicinity, and no one left the building as they approached.

The kitchen door at the rear of the house was open. Senior Deputy Smith, who was the lead officer and the first to arrive, saw movement inside the house, through the steel security screen.[2] As they quickly approached, officers loudly announced their identity and purpose in English and in Spanish, then entered the residence. As Smith ran through the kitchen, he saw appellant sitting against the south wall. Smith directed other members of the team to watch appellant, her adult daughter Adriana, and her teenage son, who were in the kitchen. They appeared to have been caught off guard. Smith and other officers proceeded further into the residence to secure it. Nobody was in the master bedroom, but two juveniles – Valentin and Concepcion – were walking from the bedroom area into the living room. They appeared to be startled.

Appellant was acquitted of the alternatively-charged, lesser offense of methamphetamine possession (§ 11377, subd. (a)).

[2] Smith was actually called as a defense witness. For the sake of clarity, we have included his testimony with the prosecution's evidence.

Senior Deputy Stevenson was the third or fourth officer to enter the house. When he entered the kitchen, appellant was still seated in a chair. She was not wearing an arm sling. By the time Sergeant Rodriguez saw appellant, she was standing. She then clutched her chest, maintained both her hands in a clenched position, and basically started to kneel down, orchestrating what appeared to be a fall. It was a slow, methodical move. Stevenson observed her to be shaking badly. Her daughter said she was having a seizure, but her movements were not consistent with what Rodriguez had seen in people having seizures. In his experience, such people basically tense up and fall. Instead, appellant lowered herself to her knees using one hand, then slid forward and rolled over onto her back. Her arms and legs were tightly wrapped around herself and one another. Appellant's daughter was helping to hold her up. Stevenson described the scene as being chaotic, as appellant's children were hysterical and, because appellant kept moving her hands back and forth, Stevenson was yelling at her for his own safety to stop moving.[3]

Although Stevenson had not seen anything in appellant's hands, he suspected she was holding something. At one point, she lay down and rolled forward near the stove. Rodriguez told Stevenson to keep monitoring her, as he felt she was going to try to secrete something underneath the stove. Her hands never opened up. She inched her way toward the bottom of the stove, "[l]ike a snail move."

Appellant's hands were clenched tightly into fists against her chest, her face was contorted, and her legs were twisting. Her right hand was the largest, as if it was

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[3] Based on his experience, Stevenson similarly did not believe appellant was having a seizure. However, he summoned an ambulance. Officer Herrera picked appellant up from the hospital emergency room approximately two to two and a half hours after entry was made into the house. Appellant walked from the emergency room to the patrol car, had no trouble getting into the vehicle, and appeared to have full use of her arms and legs.

concealing something. Stevenson saw her move her right hand toward the stove. She appeared to have full use of her hands, and he thought she was placing something underneath the appliance, where there was an opening. Although Rodriguez did not see any exchange between appellant and her daughter, whom he thought was massaging appellant's hands, Stevenson saw them exchange what was later determined to be a car key.

After another minute or two of going through what appeared to be a theatrical type of seizure, appellant quieted and sat up on the floor. She said she would like to speak to the Spanish-speaking officer, i.e., Rodriguez. She handed him a small, black, coin-type purse which was decorated with silver or white metal rings, zippers, and snaps, as well as an embroidered moth or butterfly. The purse smelled like dirty gymnasium socks, a strong odor that was consistent with methamphetamine. Appellant said she had found the item in the yard the day before, and that "Berto" had dropped it. She said she was holding it so that if Berto returned, she could give it back to him. She denied knowing what it was. She said she did not know much about Berto, but that he was a person who sold CDs around the neighborhood.

Rodriguez handed the item to Stevenson, who opened it and discovered what were subsequently determined to be 52 individual small plastic baggies, tied in knots and containing methamphetamine and MSM, a cutting agent. The net weight of the contents was 19.8 grams, a usable amount. The bindles ranged in weight from .3 grams to .7 grams. Bindles of that size would bring at least $10-$25 a piece on the street. A methamphetamine user would not commonly possess 52 separate bindles of methamphetamine.

The residence was searched. Numerous pieces of plastic that had been cut from plastic baggies were found in a trash can in the kitchen. Using cut and tied baggies is a common means of packaging methamphetamine for sale. A blue zippered purse containing a Tanita brand electronic gram scale, small scissors, a small white plastic

spoon, and several cut square pieces of clear plastic, was found on top of an armoire-type closet in the master bedroom. A Tanita brand scale is the most common type of scale used by methamphetamine dealers to weigh their product for sale. The cut plastic pieces were common in the packaging of illegal narcotics, and drug dealers often use something like the small spoon to scoop narcotics out of the main bag, where they have the bulk of their illegal drugs, onto the scale for weighing.[4]

Smith and Stevenson both opined that, based on the items found at the scene, including the presence of 19 grams of methamphetamine, packaging, and a gram scale, the methamphetamine was possessed for sale. No cash was found. In Stevenson's experience, however, methamphetamine dealers commonly take items in trade, not just cash, for the drugs.

II

DEFENSE EVIDENCE

A couple of minutes before the police arrived, Berto, someone appellant's son, Ramon, had seen around the neighborhood, came into the kitchen and sold them a CD for $5. When the police arrived, Ramon was alone in appellant's room, trying it.[5] Ramon denied ever seeing the little black purse that contained the drugs. According to Ramon, appellant had been hospitalized three times that year for having two strokes. The strokes impacted her ability to move her hand. Ramon never saw appellant conducting any activities with people with whom he was unfamiliar. Although a lot of visitors were in and out of the house, they were friends of Ramon and his siblings.

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[4] Smith had never been successful in obtaining fingerprints from digital scales. In this case, he did ask one of his partners to have the scales printed, but it apparently was not done. He did not request that the plastic baggies be printed, as attempts to obtain prints from plastic baggies in the past were always unsuccessful.

[5] Ramon initially testified that he was in his room.

Appellant's daughter, Concepcion, heard the police coming. She was in the kitchen, not one of the bedrooms. The only visitors at the house that day were Concepcion's aunt, who had left that morning, and the man from whom Concepcion purchased a CD for $5. Concepcion thought his name was Robert or Roberto; she did not really know him, but he came into the kitchen. When Concepcion wanted to see one of the CDs he had, he removed the plastic wrapper and put it in the trash can. He left for 10 or 15 minutes, then returned. He left again less than a minute before the police arrived.

Appellant's daughter Adriana was in the kitchen when the police arrived. She was standing next to appellant, who was seated. The police told everyone to get on the floor. Appellant rose, but got scared and started getting sick. She had a stroke in that moment, and Adriana was holding her. Everything was very confusing. Adriana did not give appellant anything, including a black pouch, and appellant did not give Adriana keys to the car. Adriana just continued to hold appellant because appellant could not stop shaking. Appellant had previously displayed similar symptoms. She started getting sick because of migraines and had been hospitalized in the past. Adriana had never before seen the blue purse in which the scale was found, and she did not know why appellant would have a digital scale in her bedroom. She denied ever helping appellant cut up plastic sandwich bags, seeing anyone do so in the house, or helping appellant package methamphetamine. She had never seen the little black purse in which the drugs were found.

Appellant testified in her own behalf. Before the police arrived, a young man called Berto came by to see if they would buy some CDs. Appellant told him that she did

not listen to CDs, but to ask her son, who was there. Berto left the house about a minute before the police arrived.[6]

Appellant found a little purse near the trash can and the stove. She saw it fall, so she picked it up and put it in her pocket. It was then the police arrived. She did not know to whom the black pouch belonged; she thought it was Berto's, as he was the only one who entered.

When the police arrived, appellant was sitting in the kitchen. The officers told everyone to go to the floor, then she got scared and was unable to hear what they were saying. She did not remember anything else. She felt like her hands became numb, as if she was in shock. She had a seizure, as she had had in the past. She also suffered from paralysis on the right side, and she had had these symptoms for several months. She was hospitalized for two to three weeks at one point, and had suffered two strokes and a heart attack. She was taking medication for high blood pressure, for the heart, and for clots in the brain.

At some point, appellant gave the black pouch to the officers. She did not tell them where she got it. She did tell them about Berto, and that the first time he came by to sell the CDs, something fell off of him, but she "never imagined it was that."

To appellant's knowledge, no one in her house used or sold drugs. A number of people lived in structures adjacent to her residence. To her knowledge, they did not have access to her house. Appellant denied putting cut-up sandwich bags into the trash can. She could not do that, as she could not move her fingers. She did not always use a sling for her arm, mostly using it the times her hand became swollen. She did not know why there were digital scales in her bedroom closet.

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[6] Rodriguez had the residence under surveillance for eight to ten minutes before the other officers arrived. During that time, he did not see anyone enter or exit the house.

DISCUSSION

I

CALJIC NO. 2.06

The prosecutor asked the trial court to instruct the jury in the language of CALJIC No. 2.06 (efforts to suppress evidence) based on testimony that appellant tried to push something under the stove. Defense counsel objected on the ground there was no evidence appellant tried to conceal anything, as nothing was ever observed in her hand, but instead only movements were seen. The court replied: "The way it's worded it says if you find that a defendant attempted to suppress evidence. I think the 'if' and the 'attempt' – it's not worded in a way that it appears that the Court is commenting on the evidence. So it doesn't give any verbal cues as to how the Court feels. [¶] In other words, it's not directed to them. It says a possibility. So if for some reason they feel that occurred, this is appropriate to give. [¶] And let's take a look at the use note for 2.06, see if we get some guidance there. [¶] See, the use note says … the Court must determine if there is evidence which, if believed, would support the suggested inference before giving this instruction, and that's what I feel that there would be."

Pursuant to CALJIC No. 2.06, the trial court subsequently instructed the jury: "If you find that the defendant – that a defendant attempted to suppress evidence against herself in any manner, such as by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt; however, this conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." Appellant now says the giving of the instruction was error.

Appellant's argument is not entirely clear. At one point, she concedes that her movements while on the floor of the kitchen constituted an attempted concealment and/or suppression of evidence. At another, she says her movements did not show an effort to suppress evidence. In either event, her ultimate contention appears to be that the giving of CALJIC No. 2.06 violated her right to due process because nothing beyond conjecture

allowed the jury to determine whether her actions manifested a consciousness of guilt with respect to the offenses for which she was on trial. Appellant appears to reason that the fact she moved her hand toward the stove does not lead to the inference she possessed methamphetamine for sale, yet CALJIC No. 2.06 suggests to a jury that if it finds a factor showing consciousness of guilt, this is evidence of guilt – despite the fact (since a defendant may have other reasons for concealing or suppressing evidence) this is not always a logical inference. Appellant claims she had a plausible explanation for her movements on the floor; since her movements neither constituted efforts to suppress evidence nor demonstrated a consciousness of guilt, she argues, "[a]ny connection between the underlying fact (the alleged suppression of evidence) and the sought-after inference (consciousness of guilt of the offense charged) is entirely speculation; the underlying fact may have just as easily led to a completely different inference that had nothing to do with the one sought by the prosecution." (Emphasis omitted.) Thus, she concludes, to instruct the jury that it could infer consciousness of guilt of the charged offenses "from what is no more than evidence that appellant made movements while she was ordered to lay down on the kitchen floor immediately prior to having a seizure … is contrary to both California law and the United States Constitution."[7]

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[7] Noting that the constitutional arguments were not asserted in the trial court, respondent contends they are not cognizable on appeal. It is settled that constitutional objections to admission of evidence are waived by a failure to raise them at trial. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Raley* (1992) 2 Cal.4th 870, 892.) Logically, the same should be true with respect to alleged instructional error, and the California Supreme Court has so found. (See *People v. Farnam* (2002) 28 Cal.4th 107, 165 [particular challenge to CALJIC No. 2.06, including constitutional claims, forfeited by failure to raise same claims in trial court]; *People v. Bolin* (1998) 18 Cal.4th 297, 326 [waiver found where defense counsel agreed evidence supported giving of CALJIC No. 2.06 and raised no objection to trial court's proposed wording of instruction].) However, neither of these cases mentions Penal Code section 1259, which permits an appellate court to

With respect to California law, "[i]t is an elementary principle … that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citation.] Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of the defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference. Furthermore, the determination of whether there is such evidence in the record is a matter which must be resolved by the trial court before such an instruction can be given to a jury." (*People v. Hannon* (1977) 19 Cal.3d 588, 597, italics omitted; accord, *People v. Hart* (1999) 20 Cal.4th 546, 620.) The trial court here made the requisite preliminary determination.

With respect to the United States Constitution, "[s]ince principles of due process protect the accused against conviction except upon proof beyond a reasonable doubt [citation], an instruction to the jury which has the effect of reversing or lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process. [Citations.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 679-680.) "'The threshold inquiry in ascertaining the constitutional analysis applicable to [the kind of jury instruction at issue here] is to determine the nature of the presumption it describes.' [Citation.] The court must determine whether the challenged portion of the instruction creates a mandatory presumption [citations], or merely a permissive inference [citation].

"review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." In light of the statute, we will address appellant's claims on the merits.

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissible inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. [¶] Mandatory presumptions … violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of the offense. [Citations.] … A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]" (*Francis v. Franklin* (1985) 471 U.S. 307, 313-315, fns. omitted; accord, *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.)

We now examine the nature of the instruction and whether it was properly given in light of the evidence presented in this case.

CALJIC No. 2.06 does not shift or lighten the prosecution's burden of proof. (See generally *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524.) Instead, the instruction "permit[s], but clearly do[es] not require, the jury to draw the inference[ ] described therein. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 131.)

"Instruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.) "A reasonable inference … 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, &545, fn. 6.) "To support an inference that the defendant attempted to suppress evidence, the record need not establish that the evidence actually was destroyed. [Citations.]" (*People v. Hart, supra,* 20 Cal.4th at pp. 620-621.)

The evidence in the present case was sufficient to permit the jury to conclude appellant attempted to suppress evidence by trying to conceal the coin purse containing contraband underneath the stove, and that, by so doing, she manifested a consciousness of

guilt. That jurors were free to accept appellant's explanations – she simply found the pouch and gave it to Rodriguez; her movements were nothing more than manifestations of her seizure – does not mean they could not draw the challenged inference if they believed the prosecution's evidence. (See *Ulster County Court v. Allen, supra,* 442 U.S. at pp. 164-165; *People v. Hughes* (2002) 27 Cal.4th 287, 335; *People v. Pensinger, supra,* 52 Cal.3d at p. 1244; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780.) A decision as to which explanation to accept "was a matter properly left for argument and for determination by the jury." (*People v. Farnam, supra,* 28 Cal.4th at p. 164.)[8]

In *People v. Crandell* (1988) 46 Cal.3d 833, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365, the defendant argued that a jury might view "consciousness of guilt" as being equivalent to a confession and establishing all elements of the charged murder offenses, including premeditation and deliberation, even though the defendant might be conscious only of having committed some form of unlawful homicide. The defendant claimed his due process rights were thus violated by CALJIC No. 2.06, as it permitted the jury to draw an impermissible inference, without foundation in reason or experience, concerning his mental state at the time of the offenses. The California Supreme Court found the defendant's fear unwarranted, stating: "A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' The instruction[ ] advise[s] the jury to determine what significance, if any,

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8 We note that jurors were also instructed, pursuant to CALJIC No. 2.01 (sufficiency of circumstantial evidence – generally), that if the circumstantial evidence permitted two reasonable interpretations, one of which pointed to guilt and the other to innocence, they were to adopt the one that pointed to innocence. We assume jurors are intelligent people and capable of understanding and correlating all jury instructions which are given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918; *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

should be given to evidence of consciousness of guilt, and caution[s] that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (*People v. Crandell, supra,* at p. 871; see also *People v. Bolin, supra,* 18 Cal.4th at p. 327; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

Appellant interprets the Supreme Court's equating "consciousness of guilt" with "consciousness of some wrongdoing" to mean that "when a judge instructs the jury that it may consider 'consciousness of guilt' as evidence of the specific offense charged in a particular case, he is telling the jury that something which is not probative of the specific offense charged ('consciousness of some wrongdoing,' as opposed to 'consciousness of having committed the specific offense charged') may still be used as evidence supporting guilt of the specific offense charged. The due process violation in such an instruction under those circumstances is obvious."

It is not obvious to us. A defendant need not manifest awareness that he or she has committed every element of a particular offense in order for consciousness of some wrongdoing to be probative on the ultimate issue of guilt. Here, for instance, appellant's attempted concealment of a pouch containing contraband may not have shed any light on whether she possessed the requisite intent to sell methamphetamine, but it did have some tendency in reason to demonstrate a consciousness that her conduct was wrongful, which in turn was relevant to a determination of her guilt.[9]

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9 To the extent it might be argued that, under the circumstances of the present case, appellant's concealment of the evidence manifested her consciousness of wrongdoing by someone else – for instance, her children – the instruction told jurors that they had to find appellant attempted to suppress evidence *against herself* before they could consider the

Since the permitted inferences were reasonable, both with respect to suppression of evidence and consciousness of guilt, the giving of CALJIC No. 2.06 was proper and violated neither appellant's right to due process nor California law. (*People v. Hart*, *supra*, 20 Cal.4th at p. 621, fn. 23.)[10] It follows that the prosecutor's reliance on the instruction in her argument to the jury likewise was proper.

II

THIRD PARTY CULPABILITY

As described in the statement of facts, *ante*, no fingerprint analysis was performed on the methamphetamine sales-related items found in appellant's house. Smith placed Valentin and Concepcion as walking from the master bedroom to the living room area, in the threshold between the two rooms, when he arrived. Ramon and Adriana placed Ramon in his mother's room alone when the police arrived. According to Ramon, he was trying out a CD. Concepcion denied being in her mother's room or going to any of the bedrooms when the police arrived. Adriana denied giving appellant anything or taking anything from her while appellant was on the ground. She denied any knowledge of the various drug-related items, and claimed the black coin pouch did not belong to anyone in the household. Appellant testified that, to her knowledge, no one in her house used or sold drugs. While there were a number of people living in the structures adjacent to her residence, to her knowledge, they did not have access to her house. She denied knowing why digital scales were in the closet of the bedroom. She denied being able to cut up

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attempt as a circumstance tending to show a consciousness of guilt. The evidence was sufficient for jurors rationally to reach such a conclusion.

[10] In fact, "[t]he cautionary nature of the instruction[] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1224; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235.)

sandwich bags as she was unable to move her fingers; however, she was not wearing a sling on her arm when officers arrived. Except for Adriana, who did not testify on the subject, appellant and her children all either directly or indirectly placed the blame for the pouch containing the methamphetamine on "Berto," a man they had seen around the neighborhood.

In argument to the jury, the prosecutor spent some time attacking the theory that Berto was responsible. She conceded the enterprise could have been a family business, but argued that if so, appellant was the one in control of it.

Defense counsel argued that appellant was a religious woman who had a working husband and was raising a family, and that these facts did not support the idea that she was the type of person who would be involved in selling drugs. He told the jury: "There was probably some criminal conduct there and I just don't believe that it was my client. [¶] When the officer went up there, the children are the ones that ran. She stayed seated at the seat. [¶] … [¶] The kids went running. The kids are the ones that went into the back. They were the ones that were in the master bedroom. What are they doing in her bedroom right when the police come?"

Defense counsel subsequently argued that, had the officers fingerprinted the various items, "that would be the end of the story. [¶] And I would bet the farm that if you take fingerprints of the scale that's there and take fingerprints of the other things that are in that bag that you're not going to find her fingerprints on them." Counsel suggested that the fingerprints of appellant's oldest daughter could be on the purse, although he cautioned, "I'm not saying that they are." He continued:

> "Their theory starts falling apart because now you've got a third-party involvement there that hasn't been accused or has been accused and has something else going. I don't know. But it says there's another involvement.
>
> "So that forces you to believe, possibly, that she has even a higher level of this criminal activity that is now involving her children. And so

now you have a conspiracy and you have children involved and now you're expected to believe that, but there hasn't been anything to show that.

"I think that you have seen evidence to the contrary. I think that you've seen the kids with criminal conduct. You've seen them run to the back.

"The boy – excuse me, the young lady said no, I wasn't back there, but the officers saw them leaving there.

"That's why I brought her in here and had her have the investigating officer take the stand.… I had to call him to have him say these kids were coming out of the bedroom. They're the ones that ran. They're the ones that took off.

"I don't know what was involved there, but they have to prove to you that she had this upper level of criminal conduct and then you start having doubts when the police act negligently and don't follow through on the evidence that's been collected.

"And that is a major part of the evidence, these fingerprints. So if you don't have these fingerprints of my client and you have the kids running out of her bedroom … something is wrong.

"And so someone else is involved and you have to take it to another level of analysis here and say that she's incorporating the kids, and that goes against the norm from what we have seen with the character evidence that was presented.

"The officers stated throughout the trial that there was some exchange between Adriana, the older girl, the one with the child, the one that lives there …. She was in a tough spot here and she's the eldest girl. She's the one that has this child and is living at home and she's probably the one with the greatest need there for drugs. But there were some exchanges and she denied them. [¶] … [¶] Why didn't she just say yes, I did? I don't know what she gave her mom.

"She may be the lady that's put on the spot, that is taking the blame or took the pouch from her and is trying to – she's the head of the family. Somehow she picked this item up and there was evidence that there were some exchanges between Adriana and certainly she didn't give that pouch to Adriana, but she ended up with it.…

"Adriana denied having made any exchanges, but that was clear, and so why would she deny that?"

Defense counsel contended appellant would have been unable physically to package the methamphetamine in knotted plastic in the manner involved in this case. He told jurors:

> "With her limitations, she can't physically do that. And she didn't have any of the money. And I suggest to you that someone else was involved with that and that if anything, if anything, she may have given false information to the police officers.
>
> "She may have known that her son or her daughters did this and you're stuck with this thing. What do you do, tell the cops look what she gave me, or do you try to make an excuse, as the head of the family, and say well, you know, the guy that was here earlier left it?
>
> "I don't know. There's been a consistent story that there was another individual there, and there probably was, and that person may have been the person that was working with someone in the house there packaging the stuff. [¶] … [¶] The most that she can possibly be found guilty of would be possession of the drugs, because if she knew that they were drugs, and it's helping her daughter or someone, she's in possession of them and that's the most that she can be found guilty of."

In rebuttal, the prosecutor pointed out that if appellant was helping Adriana or was possessing the drugs for someone else to sell, she was aiding and abetting. The prosecutor observed, "And all of a sudden we hear all this from the defense attorney about a third-party culpability of someone else other than this Berto character. None of that evidence came out. The kids all said no, I never saw this before." She also pointed out that there was no evidence of the children running down the hall.

At the conclusion of argument, outside the jury's presence, the trial court opined that perhaps an instruction on unjoined perpetrators (CALJIC No. 2.11.5) should be given. The prosecutor also asked about instructions on aiding and abetting, but defense counsel objected. The prosecutor pointed out that defense counsel's argument was third party culpability, which she believed was improper because there was no evidence to support it. The court ultimately decided against giving CALJIC No. 2.11.5, lest the jury conclude from the instruction that the court believed the People's argument.

The court subsequently instructed the jury, but gave no instructions on third-party culpability. Appellant now contends she was entitled to such instructions, and either the trial court had a sua sponte duty to give them or, alternatively, defense counsel rendered ineffective assistance by failing to request them.

"It is a defense against criminal charges to show that a third person, not the defendant, committed the crime charged. [Citation.] A criminal defendant has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime." (*People v. Jackson* (2003) 110 Cal.App.4th 280, 286.) "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.… [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Alcala* (1992) 4 Cal.4th 742, 792-793; *People v. Pride* (1992) 3 Cal.4th 195, 237-238; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017.) These limitations do not violate an accused's constitutional right to present a defense. (*People v. Hall*, *supra*, at pp. 834-835.)

The key word here is *evidence*. "Evidence is 'testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. [Citation.] 'Testimony' refers to statements made under oath. [Citation.]" (*County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1426; Evid. Code, § 140.) Attorneys' statements do not constitute evidence (*County of Alameda v. Moore*, *supra*, at p. 1426); indeed, a defense counsel's personal beliefs are irrelevant, as are those of the prosecutor (*People v. Bell* (1989) 49 Cal.3d 502, 537-538.)

In the present case, there simply was no actual *evidence* of culpability on the part of appellant's children. While we may speculate, as both attorneys did, that one or more of the children were involved, "speculation is not evidence, less still substantial evidence. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)[11]

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations.]" (*Mathews v. United States* (1988) 485 U.S. 58, 63.) Thus, "[i]t is settled that a court must instruct on general principles of law that are closely and openly connected with the facts of the case. [Citation.] The duty to instruct sua sponte on general principles encompasses the duty to instruct on defenses that are raised by the evidence, and on lesser included offenses when the evidence has raised a question as to whether all of the elements of the charged offense were present. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1129; *People v. Marquez* (1992) 1 Cal.4th 553, 581.)[12] By contrast, "[a] party is not entitled to an instruction on a theory for which there is no supporting evidence. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 868; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1523.) Moreover, "[w]e cannot discern any reason that the [United States] Constitution would require giving an instruction when no evidence to support it was adduced." (*People v. Memro*, *supra*, at p. 869; see *Mathews v.*

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11 The absence of evidence here was not occasioned by any ruling of the trial court.

12 In *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026, the California Supreme Court stated that a trial court's duty to instruct, sua sponte, on particular defenses arises "when a defendant appears to be relying on such defense and there is substantial evidence to support it [citation]." While this duty has sometimes been phrased in the disjunctive (see, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Stewart* (1976) 16 Cal.3d 133, 140), we have found no case in which a trial court was required to instruct on a defense that was unsupported by actual evidence.

United States, supra, 485 U.S. at p. 66 [evidence that government agents merely afforded opportunity or facilities for commission of crime insufficient to warrant instruction on defense of entrapment].)

In light of the absence of evidence of third-party culpability with respect to appellant's children, we conclude the trial court had no sua sponte duty to instruct thereon. (Compare *People v. Basuta* (2001) 94 Cal.App.4th 370, 387-388 [trial court abused its discretion, under circumstances, in excluding third-party culpability evidence] with *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134-1137 [third-party culpability evidence properly excluded, and related instruction properly refused].) Accordingly, we turn to appellant's alternate argument, that defense counsel rendered ineffective assistance by failing to request such an instruction.

Briefly stated, the burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, "a defendant must show that counsel (1) performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby (2) subjected the defense to prejudice, i.e., in the absence of counsel's failings a more favorable outcome was reasonably probable." (*People v. Hamilton* (1988) 45 Cal.3d 351, 377.)

Evidently recognizing the problems with pointing the finger at Berto, defense counsel appears to have made the tactical decision to focus his efforts on inviting the jury to speculate that appellant did not possess methamphetamine with intent to sell, but instead was covering for one or more of her children. We cannot fault counsel for this

strategy; it was reasonable under the circumstances, despite the fact it was not supported by actual evidence.[13]

Because of the lack of evidentiary support, counsel did not perform unreasonably by failing to request instructions on third-party culpability. Upon proper request, a defendant has a right to an instruction pinpointing the theory of his or her defense, i.e., directing the jury's attention to evidence from which a reasonable doubt of his or her guilt could be inferred. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924-925; *People v. Randolph* (1993) 20 Cal.App.4th 1836, 1841.)[14] However, "[a] trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) Indeed, "'unsupported theories should not be presented to the jury.' [Citation.]" (*Id.* at p. 40.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

In the present case, as we have discussed, no substantial evidence was presented to support a third-party culpability defense with respect to appellant's children. Accordingly, counsel was not required to draft or request an instruction thereon and, even if he had done so, the trial court would have erred by giving it. (Cf. *People v. Michaels* (2002) 28 Cal.4th 486, 531; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1400.)

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13 In this regard, we note that the prosecutor was correct: while there was evidence that Concepcion and Valentin were *walking* from the bedroom when officers entered, there was no evidence of any of the children *running*, as defense counsel claimed.

14 Appellant does not suggest any instructional language. We assume, however, she has in mind some modification of CALJIC No. 2.91 (burden of proving identity based solely on eyewitnesses). (See *People v. Kegler* (1987) 197 Cal.App.3d 72, 79, fn 1.)

III

CALJIC NO. 12.01

With respect to count 1, the trial court instructed the jury, in pertinent part, pursuant to CALJIC No. 12.01: "In order to prove this crime, each of the following elements must be proved: One, a person exercised control over or the right to control an amount of methamphetamine, a controlled substance; two, that person knew of its presence; third, that person knew of its nature as a controlled substance; fourth, the substance was in an amount sufficient to be used for sale or consumption as a controlled substance; and, fifth, that person possessed the controlled substance with the specific intent to sell the same."

During deliberations, the jury sent out a note requesting clarification. This ensued:

> "[THE COURT]: We have a note … from the jury. Clarification of charge one, intent to sell, specifically by her or can it include intent to be sold by anyone else she may be in contact with in the home? Directional arrow, item five of charge one needs clarification.
>
> "Item five is that person possessed the controlled substance with the specific intent to sell same, 12.01.
>
> "The use note – or comment, I should say, to 12.01 reads, third paragraph. There is no requirement that the defendant possess drugs so that he or she could personally sell them. The only requirement is that the defendant possess the drugs with the specific intent that they be sold.
>
> "And they cite first case People vs. Parra, 70 Cal.App.4th 222.…
>
> "So I turned to People vs. Parra and the summary indicates – in that case they were dealing with H&S 11351. It says further – and it would apply to what we have here, which is H&S 11378.
>
> "Further, on its face Health & Safety Code Section 11351 does not state that the defendant has to have the specific intent to sell the controlled substance personally, only that it be for sale. Thus, in order to be convicted of a violation of Health & Safety Code Section 11351, the defendant needs to either, one, possess the specific intent to sell the controlled substance personally or, two, possess the specific intent that someone else will sell the

controlled substance. [¶] … [¶] I propose that I answer the question by just reading what I just read and then instead of putting 11351 in, I put 11378.

"MS. ADAMS [prosecutor]: I'll stipulate to that.

"MR. CASTRO [defense counsel]: We'll stipulate, your Honor."

The jury was then brought in. The court reread the note and item five of CALJIC No. 12.01, then instructed: "On its face Health & Safety Code Section 11378 does not state that the defendant has to have the specific intent to sell the controlled substance personally, only that it be for sale. Thus, in order to be convicted of a violation of Health & Safety Code Section 11378, possession of methamphetamine for purpose of sale, the defendant needs to either, one, possess the specific intent to sell the controlled substance personally or, two, possess the specific intent that someone else will sell the controlled substance." The court then asked the jury foreperson whether this responded to the question; she replied that it did.

Appellant now contends the instructions were erroneous. In light of the strong evidence of third-party culpability, she says, jurors could rely on CALJIC No. 12.01 to find that appellant's children were the persons defined in item five who possessed the methamphetamine with the intent to sell it, and that appellant shared possession with her children; hence, they could find appellant guilty without finding that she knew of her children's intent to sell or that she had the specific intent that she or her children sell the drugs. In a claim that appears to us to fly in the face of the trial court's response to the jury's question, appellant asserts: "[I]f the jury found that appellant's children was the 'person' or 'persons' who had the requisite intent to sell, it was not otherwise required by the instruction that it find appellant had the intent to sell the drugs personally or the intent that they be sold." Appellant further claims that, when faced with the jury's request for clarification, the trial court failed to adequately respond to the issue of third-party culpability.

"The offense of possession of [narcotics] for sale involves four elements: (1) Actual or constructive possession of the narcotic, (2) for the purpose of sale with knowledge, (3) of its presence, and (4) of its narcotic character. [Citations.]" (*People v. Spearman* (1979) 25 Cal.3d 107, 121, abrogated on another point in *People v. Castro* (1985) 38 Cal.3d 301, 312-313.) CALJIC No. 12.01 thus was a correct statement of the law. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.) The same holds true with respect to a claim that an instruction lacked clarity. (*People v. Welch* (1999) 20 Cal.4th 701, 757.) Appellant's failure here to request additional instructions "waives the claim in this court. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 514.)

Appellant protests that CALJIC No. 12.01 was in fact not responsive to the evidence. However, as we have seen, there was no *evidence* of third-party culpability with respect to appellant's children. Accordingly, the trial court initially was under no duty to give amplifying or clarifying instructions. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014-1015; see *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318-1319.)

Once the jury asked for clarification, however, the trial court's duty under Penal Code section 1138 was triggered. (*People v. Solis, supra,* 90 Cal.App.4th at p. 1015.) That statute provides in part: "After the jury have retired for deliberation, … if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given …." In this regard, "[t]he court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for

information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Here the trial court properly consulted the comment to CALJIC No. 12.01, and then the cases cited therein, to determine an appropriate response. That response was expressly agreed to by defense counsel; "defense counsel's approval … should bar defendant from contending on appeal that a more elaborate response should have been made. If defendant desired such a response, [she] should have proposed it. [Citations.]" (*People v. Medina* (1990) 51 Cal.3d 870, 902, affd. *sub nom. Medina v. California* (1992) 505 U.S. 437.) In any event, the trial court's further instruction answered the jury's question, as the jury foreperson confirmed. In our view, it was also responsive to the issues the jury was required to decide.

In *In re Christopher B.* (1990) 219 Cal.App.3d 455 (*Christopher B.*), Division One of the Fourth District Court of Appeal considered a case in which the minor was alleged to have possessed cocaine for sale. The trial court took the view that possession for sale was not a specific intent crime, and opined that it was sufficient if one participated in possessing drugs, knowing they were going to be sold, regardless of whether that person intended to do the actual selling. The court found the minor knew there was cocaine and that it was going to be sold; accordingly, it found the petition true. The appellate court reversed, stating: "Although this record may circumstantially support a true finding of specific intent, the trial court made the erroneous legal conclusion that possession of cocaine for sale is not a specific intent crime. Thus the court found it unnecessary for the People to prove the element of specific intent or to make a finding of such intent. Instead the court based its finding that Christopher possessed cocaine for sale on Christopher's knowledge the 'rocks' were to be sold. Absent a finding Christopher had the specific intent to sell, a true finding of possession for sale cannot be made." (*Id.* at p. 466.)

In *People v. Consuegra* (1994) 26 Cal.App.4th 1726 (*Consuegra*), Division Three of the same district confronted a case in which the jury had sent the court a note inquiring

whether the requirement of CALJIC No. 12.01, that a person possessed the controlled substance with the specific intent to sell the same, meant the individual was going to personally sell the substance, or had knowledge that it was going to be sold by someone else. The court responded that either situation would suffice. On appeal the defendants argued that, if jurors focused on the word "knowledge," they might have concluded they could convict if they found the defendants merely knew someone else would eventually sell the drugs, a conclusion which would run afoul of *Christopher B.* The appellate court noted that the trial court's error in that case was finding the charge true based on the assumption that knowledge of an ultimate sale was sufficient. (*Consuegra*, *supra*, 26 Cal.App.4th at pp. 1731-1732.) The court observed: "The court in *Christopher B.* was not called upon to determine whether the perpetrator must intend to sell the drugs personally, and no case since has dealt with that issue. We see no meaningful distinction in culpability between the individual who holds drugs to sell personally and the one who holds them for others to sell. The sections dealing with possession for sale do not specify that the drugs be held for the possessor to sell but only that they be 'for sale.' [Citation.] The requisite mental state is satisfied when the drugs are possessed with the specific intent that they be sold, regardless of whether the possessor intends to sell them personally." (*Id.* at p. 1732, fn. 4.)

In *People v. Parra* (1999) 70 Cal.App.4th 222 (*Parra*), Division Two of the Fourth District interpreted *Christopher B.* as holding that in order to be convicted of possession for sale, a defendant must possess the controlled substance with the specific intent to sell it him- or herself. Under *Consuegra*, by contrast, the requisite mental state for conviction is satisfied when the defendant possesses the drugs with the specific intent that they be sold, regardless of whether he or she intends to sell them personally. The *Parra* court concluded: "In our view, the position taken by our colleagues in [*Consuegra*] is a correct one. On its face, Health and Safety Code section 11351 does not state that the defendant has to have the specific intent to sell the controlled substance

personally, only that it be '"for sale."' [Citation.] The Use Note to CALJIC No. 12.01 does not indicate that there is a requirement that the controlled substance must be possessed with the specific intent to sell it personally. Furthermore, we find no meaningful distinction in culpability between the defendant who actually sells the controlled substance and the defendant who transports it with the specific intent that someone else will sell it, as they both share in the specific intent to sell. Therefore, we conclude that in order to be convicted of a violation of the Health and Safety Code section 11351 the defendant needs to either (1) possess the specific intent to sell the controlled substance personally, or (2) possess the specific intent that someone else will sell the controlled substance." (*Parra*, *supra*, 70 Cal.App.4th at pp. 226-227.)

Appellant urges us to follow *Christopher B.*'s reasoning.[15] We are not necessarily convinced that opinion conflicts with the holdings of *Consuegra* and *Parra* or that, as stated in *Parra*, it holds a defendant must specifically intend to sell the controlled substance personally. The appellate court in *Christopher B.* said only that a true finding could not be made "[a]bsent a finding Christopher had the specific intent to sell …." (*Christopher B.*, *supra*, 219 Cal.App.3d at p. 466.) It said nothing about whether he had to intend personally to sell the contraband. Thus, unlike the *Parra* court, we read *Christopher B.* for the unremarkable proposition that knowledge the contraband possessed ultimately will be sold is insufficient to warrant a conviction for possession for sale: knowledge that an ultimate result will occur does not constitute the specific intent that said result occur.

In light of the statutory language, we agree with *Consuegra* and *Parra* that while a specific intent to sell must be proven in order to convict a defendant of possession of a controlled substance for sale, the requirement is satisfied if the defendant either has the

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15 The pertinent language of section 11378 is the same as that of section 11351.

specific intent to sell the substance personally *or* has the specific intent that someone else will sell it. (See *Parra*, *supra*, 70 Cal.App.4th at p. 227; *Consuegra*, *supra*, 26 Cal.App.4th at p. 1732, fn. 4.) The trial court here correctly conveyed this principle to the jury. Its response to the jury's inquiry prevented jurors from transferring the children's alleged intent to sell to appellant, such that she could be convicted upon a finding of mere knowledge of the children's intent to sell; instead, jurors were required to find that appellant herself had the specific intent personally to sell the methamphetamine she possessed, or that she herself had the specific intent that someone else would sell it. Since we, like the appellate courts in *Parra* and *Consuegra*, discern no meaningful distinction in culpability between the two situations, we conclude that either was sufficient for conviction. There was no error.

DISPOSITION

The judgment is affirmed.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Wiseman, J.

_____
Levy, J.